

Risk Rx

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How Is Your Bedside Manner?

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1.) *A young mother of three children waits patiently to be evaluated by the community's most respected colorectal surgeon. She is beleaguered by symptomatic hemorrhoids, the residual of three pregnancies. The surgeon is very pleasant and performs a thorough examination, after which he lists all of the options available for the patient to choose as therapy for her problem. The young woman is not a doctor and has little association with the health care profession. She has no idea which of the options presented to her would be the most suitable to her situation and is left in a quandary because the physician, despite his pleasantness and obvious concern, would not commit to a specific recommendation for her care.*

2.) *A young father looks in shock as his three-year-old son fights for life in an intensive care unit. His little boy is trying to recover from massive injuries sustained in an automobile crash that killed his wife. Many physicians, nurses, and other health care professionals are scurrying about. The child is obviously the center of an enormous amount of intensive and expensive technology, each element of which brings an expected benefit and an accepted risk. The father talks to the physicians on the health care team. He listens, but does not hear. His*

ability to understand and comprehend is almost completely supplanted by grief at the death of his wife.

3. *In a busy clinic, a well-respected surgeon introduces himself to a new patient, discusses briefly the patient's concerns, examines the patient, and then informs the patient that the resident team will be arriving shortly to complete a full evaluation in preparation for the recommended surgical procedure. The busy surgeon then goes on to the next patient.*

Each of these scenarios represents a combination of good and bad. Physicians today are overwhelmed by increasing administrative stress, decreasing levels of reimbursement, and a variety of other factors, all of which compete effectively for the most valuable asset any physician possesses – his or her time. In the first case, the community surgeon, having previously encountered the uncomfortable end of litigation, is not willing to commit to a specific recommendation for fear that his recommendation would not be agreeable to the patient and that any adverse results would result in litigation or at least a complaint. That physician, despite his obvious care and compassion and the respect that he enjoys from patients and peers alike, has not really met his patient's needs. What his patient needs is the benefit of his expertise to make a recommendation based on his professional assessment.

The second scenario is even more challenging. There are many physicians, all of whom are distracted by a variety of different issues, attempting to provide integrated, multi-disciplinary care while maintaining some degree of liaison with the family. This circumstance represents a very common situation in increasingly sophisticated health care facilities where multiple specialists co-manage

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patients and provide varied insight to family members from differing physiologic and anatomic perspectives. This case, like the first, needs a lead physician who combines compassion and comprehensive understanding to provide a central source of information to families who are, by definition, in crisis. Consultants bring special expertise to the bedside but must remember that their input should complement, rather than contradict, the message of the rest of the health care team. Adding more confusion to families in crisis does nothing but undermine confidence, exacerbate fear, and increase frustration. Regardless of clinical outcome, these become the building blocks of patient dissatisfaction.

The third case is all too common in academic health care environments. Effective graduate medical education requires that trainees have an opportunity to interact with the patients of attending clinical faculty. At the same time, the attending faculty member must remain fully identified and involved as the leader of the health care team. The patient must be assured that an accomplished and experienced attending physician is responsible for the patient's care, and that care will be in concert with the physician trainees. Remember, most patients have absolutely no idea how doctors are trained!

With respect to bedside manner, *the common thread we want to exhibit is compassion, concern, and effective communication.* Each patient is different; each scenario is different, as is the level of stress that distracts from effective communication. Thus, when one looks at the process of determining a relationship in which a physician identifies himself or herself as the individual who will be responsible for a patient's health care, one must understand that this is the establishment of a unique relation-

ship based on confidence and communication. Good bedside manner does not necessarily mean playing the role of "best buddy" with every patient. It does mandate, however, that the physician primarily responsible for a patient's care be known to the patient, and that this physician communicates effectively with the patient. *Demonstrating genuine concern regarding the patient's welfare and commitment to the patient's care will establish a relationship of trust and reliance that will withstand the confusion of modern health care delivery.* Too often, the hierarchal design of academic medicine undermines this critical part of an effective physician-patient relationship.

The more complex the situation, the more likely that increasingly invasive technology may yield adverse, as well as successful, results. In these times of continued stress, the attending physician must commit enough time to identify himself or herself as the leader of the team. If nothing else, this illustrates to trainees that the practice of medicine is a combination of art and science, and that the primary goal of all practitioners is the well being of their fellow man, regardless of the adversity of the environment.

Use of Presuit Voluntary Binding Arbitration as an Alternative Dispute Resolution Process in Medical Malpractice Cases¹

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Litigation of malpractice cases is very costly, not



only in monetary terms, but also because of the substantial emotional drain experienced by the litigants during the protracted timeline to finality.

Alternative dispute resolution (ADR) practices initiated prior to the onset of litigation miti-

gate these costs. ADR processes can be informal or formal. Risk management professionals and insurers, for example, may approach a patient to attempt to resolve a claim to the patient's satisfaction, without the patient's resorting to the formal legal process. A presuit mediation program in which the patient and the health care provider agree to engage a mediator to assist them in resolving their dispute prior to more formal legal action is also an effective mechanism to resolve claims early, efficiently, and in a less-costly manner. The University of Florida J Hillis Miller Health Center Self-Insurance Program, with whom the authors are employed, maximizes these two ADR processes to attempt to resolve patient claims and concerns at the earliest stages of a dispute.

In Florida, formal ADR procedures are found within the state's statutory scheme at various stages of the litigation and pre-litigation processes. Florida law requires that the parties to a lawsuit attend court-ordered mediation in good faith². The court may also order the litigants to submit to nonbinding arbitration³. Both of these ADR processes occur during the litigation phase of the lawsuit, often after great costs have been incurred by the parties. Voluntary binding arbitration is another statutory

ADR process that parties to a claim may use prior to the onset of litigation. Although this mechanism can be used in any civil dispute,⁴ a specific voluntary binding arbitration process is available to parties to a medical malpractice dispute. During the statutorily-required, presuit stage⁵ of a medical negligence claim, any party to the noticed claim may offer to engage in voluntary binding arbitration to resolve their differences without formal litigation.⁶ Under this statutory scheme, the defendant admits liability and the arbitration process is used solely to determine damages to be awarded to the claimant.⁷ The intent of this article is to familiarize the reader with the voluntary binding arbitration process that may, if used wisely, be a very helpful mechanism for the parties to the claim to resolve medical negligence claims early, more cost-effectively, and with finality.

Who May Engage in Voluntary Binding Arbitration

Voluntary binding arbitration is available to all persons and entities in Florida, except for rights of action involving the State of Florida or its agencies or subdivisions, or the officers, employees, or agents thereof, pursuant to sovereign immunity Florida Statutes § 768.28.⁸ All of the state universities providing health care services, such as the University of Florida College of Medicine, therefore, may not use the voluntary binding arbitration process. Although Shands, on July 1, 2011, was afforded sovereign immunity under Florida Statutes § 768.28, it may still avail itself and be subject to the voluntary binding arbitration statute for incidents occurring prior to its grant of immunity. Potentially, these pre-immunity incidents may subject Shands to liability without the benefit of

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immunity for a couple more years until the Statute of Limitations or Statute of Repose expire. For non-immune hospitals affiliated with state medical health care providers, however, the voluntary binding arbitration process can be quite an effective ADR opportunity to resolve medical malpractice claims.

Notice, Timing, and Process

During the presuit stage of a medical negligence claim, the parties may elect to have damages determined by an arbitration panel.⁹ Either party may initiate the process by serving a request upon the opposing party for voluntary binding arbitration of damages within 90 days after service of the claimant's notice of intent to initiate litigation upon a defendant.¹⁰ If there are multiple defendants, the claimant must submit the offer to arbitrate to each defendant against whom the claimant has asserted a claim in the pre-suit notice of intent to initiate litigation.¹¹ Conversely, if there are multiple claimants, any defendant who wishes to offer voluntary binding arbitration must submit the offer to each claimant who has joined in the notice of intent to initiate litigation.¹² Acceptance of the request by a party within these statutorily-defined time limits is a binding commitment to comply with the decision of the arbitration panel.¹³ Florida law further requires that parties represented by an insurer or self-insurer affirmatively consent to any offer by the insurer or self-insurer to submit to voluntary binding arbitration. An insurer or self-insurer involved in the claim is prohibited from offering to arbitrate or to accept a claimant's offer to arbitrate without the written consent of the insured.¹⁴

Once arbitration is accepted, no other recourse or remedy is available to the claimant against any

participating defendant, and the process is undertaken with the understanding that damages will be awarded as provided by general law, including the Wrongful Death Act, subject to some limitations that will be discussed in this article.¹⁵ The consent to engage in voluntary, binding arbitration, however, does not preclude settlement at any time by mutual agreement of the parties.¹⁶

The timing of the arbitration hearing is normally dependent upon the coordination of the schedules of the parties and of the arbitration panel, which is composed of three arbitrators: one selected by the claimant, one selected by the defendant, and an administrative law judge furnished by the Division of Administrative Hearings who serves as the chief arbitrator.¹⁷ If there are multiple plaintiffs or multiple defendants, the side or sides with multiple parties will attempt to agree upon a single arbitrator as the selection for their side. If the multiple parties cannot reach a consensus, each party individually will nominate an arbitrator, and the director of the Division of Administrative Hearings will appoint one of the nominated arbitrators to the arbitration panel.¹⁸ The arbitrators are required to be independent of all parties, witnesses, and legal counsel; no officer, affiliate, subsidiary, or employee of any party, witness, or legal counsel may serve as an arbitrator.¹⁹ The hearing is conducted by all of the arbitrators, but a majority determines questions of fact or any final decision, while the chief arbitrator decides all evidentiary matters.²⁰ The procedural rules for orderly and efficient processing of the arbitration procedures and proceedings are promulgated by the Division of Administrative Hearings.²¹

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Consequences When the Parties Agree to Voluntary Binding Arbitration

If the parties agree to submit to voluntary binding arbitration, there are consequences related to damages, costs, and fees; these consequences may be either beneficial or limiting, depending upon the party and the issues in the case.

Benefits to the Defendant

Limitations on Noneconomic Damages: The defendant receives the benefit of a cap on noneconomic damages that could be awarded by the arbitration panel, by limiting the amount of noneconomic damages to \$250,000

“per incident” [emphasis added]. This cap may be reduced, depending upon the percentage basis with respect to the claimant’s capacity to enjoy life.²² If the arbitration panel finds that the injury reduced the claimant’s capacity to enjoy life to 50%, the maximum award per incident for noneconomic damages would be \$125,000. Although the “per incident” language might, at first glance, be read to limit all claimants to a total aggregate of \$250,000, the Florida Supreme Court has interpreted the language as limiting *each claimant* to \$250,000, regardless of the number of claimants.²³ Therefore, in a situation where a husband is injured through malpractice, and his claim includes noneconomic damages for physical and mental pain and suffering, and the wife’s claim includes noneconomic damages for lack of consortium / companionship, the total possible noneconomic damages both claimants may receive is \$250,000 each for an aggregate recovery of \$500,000. Conversely, the Third District Court of Appeals has recently ruled, that although there is a separate cap of \$250,000 for each *claimant* in the litigation, the aggregate for all defendants cannot total more than \$250,000 per claimant, regardless of the num-

ber of defendants.²⁴ Consequently, if a claimant is injured as a result of medical negligence and there are five named defendants, the maximum possible amount of noneconomic damages the claimant from all of the defendants in the aggregate is a total of \$250,000. Under the 2003 Tort Reform provisions, noneconomic damages are capped in medical malpractice cases for practitioners and non-practitioners, but those caps are much higher and can be as high as \$1,500,000 in the aggregate.²⁵ Unless there are a large number of claimants, a defendant normally benefits from the lower cap on noneconomic damages recoverable by the claimant under the voluntary binding arbitration provisions of Florida law.

No Punitive Damages: The Florida legislature removed punitive damages from consideration by the arbitrators, thus relieving the defendant of the exposure to a large jury award that would be possible had the parties proceeded to trial.²⁶

Limits on Economic Damages and Periodic Payment Provisions: As noted previously, economic damages awardable by the arbitration panel are those provided by general law, including the Wrongful Death Act. These damages may include, but are not limited to, medical expenses, wage loss, loss of earning capacity, and net accumulations to the estate in wrongful death cases.²⁷ Economic damages that include wage loss and loss of earning capacity are limited to 80% of the net wage loss and loss of earning capacity calculated by the arbitrators, offset by any collateral source payments.²⁸ Additionally, damages for future economic losses awarded by the arbitrators must be payable in periodic payments, offset by future collateral source payments, thereby mitigating the immediate adverse financial impact to the defendant.²⁹

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Benefits to the Claimant

Quick Resolution of the Claim and Deterrence to Appeal: The voluntary binding arbitration process fosters a quick and certain resolution of the claim in a cost-effective manner, saving the claimant from the frustration associated with years of “paper” discovery, depositions, and delay, and further saving the claimant from the substantial costs associated with expert witnesses during the litigation process. Although misarbitration can occur when the arbitrators cannot reach agreement, the statutory scheme provides a relatively easy process to dissolve the arbitration panel and appoint a new one.³⁰ Quick payment of the arbitrators’ award is required. The current statute requires payment of the arbitration award, including interest (at the legal rate) within 20 days after the determination of damages by the arbitration panel, and if the defendant fails to pay within this 20-day period, the award will begin to accrue interest at the rate of 18 percent per year.³¹ No arbitration panel or member thereof, and no circuit court may stay an arbitration award.³² The district court of appeal for the district in which the arbitration took place has jurisdiction over any appeal of the arbitration award.³³ The appeal is limited to the review of the record³⁴ and will not operate as a stay of the arbitration award, unless the district court of appeal stays the order to prevent manifest injustice.³⁵ As an obvious deterrent to appeal, and to encourage finality, the voluntary binding arbitration provisions do not provide for attorneys fees to be paid to the prevailing party on appeal.³⁶ These provisions may be very attractive to a claimant, especially when the arbitration panel’s award is generous. The claimant receives quick payment, without the high cost of litigation, and without a great threat of a successful appeal of the award by the

defendant.

Costs and Fees Are Paid by the Defendant: The defendant is required to pay reasonable attorney’s fees and the costs awarded by the arbitration panel, but these fees and costs are subject to a maximum of 15% of the award, reduced to present value.³⁷ The defendant is required to pay the arbitrators’ fees, except that of the administrative law judge, and must pay the cost of the arbitration itself. The defendant also bears the responsibility for interest on accrued damages.³⁸

Consequences When One Party Refuses an Offer of Voluntary Binding Arbitration

Defendant’s Refusal of Offer of Voluntary Binding Arbitration: If a defendant refuses a claimant’s offer of voluntary binding arbitration, the claim proceeds to trial. If the claimant is the prevailing party at trial, the defendant is adversely affected by the refusal to accept voluntary binding arbitration.

Prejudgment Interest and Attorney’s Fees: In addition to any costs of trial awarded by the trial judge, the defendant would be required to pay to the claimant prejudgment interest and reasonable attorney’s fees up to 25 percent of the award, reduced to present value.³⁹ Prejudgment interest can mount significantly during the protracted course of litigation. This reality and the threat of having to pay substantial attorney fees to a prevailing claimant, provide the claimant substantial leverage when the claimant initiates the offer to resolve the dispute by voluntary binding arbitration.

Noneconomic Damages: The \$250,000 voluntary binding arbitration cap would not be available to the defendant, and the defendant will be exposed

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to cap of up to \$1,500,000 pursuant to Florida Statutes § 766.118.

Claimant's Refusal of Offer of Voluntary Binding Arbitration

Reduced Caps on Noneconomic Damages: If a claimant rejects a defendant's offer of voluntary binding arbitration, the noneconomic damages awarded at trial will be reduced to \$350,000 per incident.⁴⁰ Although this recovery would be higher than the \$250,000 cap per incident had the claimant accepted the offer of voluntary binding arbitration, the claimant loses the opportunity to attempt to recover the higher cap in litigation (up to \$1,500,000) set forth in s. 766.118, Florida Statutes.

Lower Recoverable Economic Damages: Refusing to accept the defendant's offer reduces any jury award for lost wages and loss of earning potential damages to 80% of such damages, reduced to present value.

Attorney Fees May Not Be Recovered: By refusing to accept the defendant's offer, the claimant foregoes the statutory benefit of defendant's having to pay the claimant's attorney fees in an amount up to 15% of arbitration award.

Practical Considerations

In evaluating the practical implications and effects of voluntary binding arbitration, a review of previous awards may be helpful in evaluating the efficacy of making, accepting, or rejecting an offer to engage in voluntary binding arbitration. In her survey of voluntary binding arbitration awards from 1998 to 2006, Marie H. Ruiz noted that where the parties had agreed to accept voluntary binding arbitration, only a few cases (11) resulted in an arbitration award, because the parties settled their case

prior to the arbitration hearing.⁴² It appears from the data in the survey that when parties agree to voluntary binding arbitration, the risks and benefits of the statutory scheme have the collateral effect of encouraging both sides to settle their dispute at early stages of the claims process. The survey also revealed that except for two of the cases where the arbitrators determined that 15% of the award was too high, the other panels awarded the statutory 15% maximum in costs and attorney fees.⁴³ Therefore, arbitration panels may be likely, in most cases, to award the full 15% statutory cap on costs and fees to the claimant. As noted previously, the arbitration panel may reduce the cap on noneconomic damages on a percentage basis relative to the capacity to enjoy life. Ruiz found that, except in death cases, the arbitration panel awards resulted in reductions from the cap. Accordingly, in cases not involving wrongful death, it would be beneficial for both parties to vigorously contest the issue of the capacity to enjoy life to attempt to maximize or minimize the award of noneconomic damages.

It is clear from the statutory scheme that the Florida legislature has attempted to encourage parties to settle disputes in avoidance of litigation. The legislature has attempted to make voluntary binding arbitration an attractive ADR process for both claimants and defendants. The legislature built in benefits for accepting offers of voluntary binding arbitration and added the leverage of risk for refusing such offers, in order to encourage early resolution of malpractice claims. Incentives to offer voluntary binding arbitration at the earliest stages of a medical malpractice dispute make this statutory process one that must be carefully evaluated by attorneys representing clients in medical malprac-

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tice cases, and by insurers in assessing the value of medical malpractice claims.

The incentives to the defendant, including reduced noneconomic caps, reduction in the amount of economic damages for lost wages and earning capacity, and the utilization of periodic payments for certain economic damages, must be weighed against the risk of exposure to high noneconomic damages, the type of case (e.g. wrongful death, survivor case, or other medical malpractice case), the number of claimants, and the risk of paying the claimant's attorney fees.

The incentives to the claimant, such as the payment by the defense of all arbitration costs, arbitrators' fees, attorney fees, and quick payment of damages, without resorting to litigation, need to be evaluated in light of the lower caps on noneconomic damages, the willingness of the claimant to accept reductions in recovery of certain economic damages, and the willingness of the claimant to accept recovery for future economic damages in periodic payments. Claimants must also accept the reality that in all cases, except those for wrongful death, the arbitrators will not award the full noneconomic cap.

Conclusion:

Attorneys and insurers handling medical malpractice cases must conduct a thoughtful and comprehensive analysis of the impact of the voluntary binding arbitration provisions in order to render competent, effective, and professional assistance to their clients. Failure to do so may result in a lost opportunity to maximize benefits and minimize risks inherent to the resolution of a medical malpractice claim.

For more information on Alternative Dispute Resolution (ADR) visit our website at:

<http://www.flbog.sip.ufl.edu/>

Health care providers can earn CE credit good towards state requirements for Risk Management continuing education.

¹This article is intended to serve as a primer for our insured clients who may wish to consider presuit voluntary binding arbitration as an alternative dispute resolution mechanism. The more common issues are addressed herein, but more complex issues relating to multiple defendants and claimants and joint and several liability issues under the statutory scheme were omitted for page-length consideration.

²Fla. Stat. § 44.102 (2012); Fla. Stat. § 766.108 (2012); Fla. R. Civ. P. 1.700 *et. seq.*

³Fla. Stat. § 44.103 (2012); Fla. Stat. § 766.107 (2012). Note that court-ordered nonbinding arbitration may not be ordered for a party enjoying sovereign immunity under Fla. Stat. § 768.28 (2012)

⁴See, e.g. Fla. Stat. § 44.104 (2012)

⁵See, generally, Fla. Stat. § 766.106 (2012)

⁶Fla. Stat. § 766.207 (2012); See also, Fla. Stat. §106(3)(b) (2012)

⁷See generally, Fla. Stat. § 766.207

⁸Fla. Stat. § 766.207(1) (2012)

⁹Fla. Stat. § 766.207(2) (2012)

¹⁰*Id.*

¹¹Fla. Stat. § 766.207(7)(k) (2012)

¹²*Id.*

¹³Fla. Stat. § 766.207(3) (2012)

¹⁴Fla. Stat. § 766.207(8) (2012)

¹⁵See, generally, Fla. Stat. § 766.207(7) (2012)

¹⁶*Id.*

¹⁷Fla. Stat. § 766.207(4) (2012)

¹⁸*Id.*

¹⁹Fla. Stat. § 766.207(5) (2012)

²⁰Fla. Stat. § 706.207(7)(l) (2012)

²¹Fla. Stat. § 766.207(9) (2012)

²²Fla. Stat. § 766.207(7)(b)(2012)

²³*St. Mary's Hosp., Inc. v. Phillipe*, 769 So. 2d 961 (Fla. 2000), *re-hearing denied*.

²⁴*Deno v. Lifemark Hospitals of Florida*, 45 So. 3d 959 (Fla. 3d DCA 2010), *review denied*, 57 So. 3d 846 (Fla. 2011)

²⁵See, generally, Fla. Stat. § 766.118 (2012)

²⁶Fla. Stat. § 766.207(7)(d) (2012)

²⁷Fla. Stat. § 766.207(7)(a) (2012)

²⁸*Id.*

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²⁹Fla. Stat. § 766.207(7)(c) (2012)

³⁰Fla. Stat. § 766.21 (2012)

³¹Fla. Stat. § 766.211 (2012)

³²Fla. Stat. § 766.212(2) (2012)

³³Fla. Stat. § 766.212(1) (2012)

³⁴*Id.*

³⁵Fla. Stat. § 766.212(2) (2012)

³⁶See generally, Fla. Stat. § 212 (2012)

³⁷Fla. Stat. § 766.207(7)(f) (2012)

³⁸Fla. Stat. § 766.207(7)(e) (2012)

³⁹Fla. Stat. § 766.209(3)(a) (2012)

⁴⁰Fla. Stat. § 766.209(4)(a) (2012)

⁴¹Fla. Stat. § 766.209(4)(b) (2012)

⁴²Maria H. Ruiz, *Voluntary Binding Arbitration of Medical Malpractice Claims: A Survey of Awards Entered From 1998-2006*, 26 Trial Advoc. Q. 17 (Winter 2007)

⁴³*Id.*



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